No. 422

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

OFFICE EMPLOYEES INTERNATIONAL UNION, LOCAL NO. 11, AFL-CIO, *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONER

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I. THIS COURT SHOULD DECIDE THIS CASE ON THE ISSUES PRESENTED

The National Labor Relations Board has suggested to this Court (Br. 15-16) that it may be deemed appropriate to remand this case to the Board for its further consideration on the policy issue involved. The Board supports this suggestion with the assertion that of the four members who ruled on the policy question, only two would decline jurisdiction, while

another two would assert it. It is further pointed out that the two NLRB members who made up the controlling majority in this case are no longer with the agency (Br. 15). Inherent in this Board suggestion is the thought that now that two new members have joined the agency, replacing the two who primarily decided this case, that this change in personnel would produce a different policy result were the issue again presented to the NLRB.

Petitioner objects to this suggestion and requests this Court to rule on the issues presented.

First of all, despite the Board intimation, there is no assurance that two new members will take a policy view contrary to that previously expressed by Chairman Farmer and Member Peterson. Should this case go back, the two new members might conceivably rule as did Farmer and Peterson, Member Murdock may adhere to his former position, and petitioner would be left in the same fate as before. The Court of Appeals for the District of Columbia Circuit has already approved the Board's refusal to take jurisdiction, and petitioner would be faced with coming once again to this Court on a petition for certiorari to correct what it believes are serious errors in law.

Secondly, and more fundamentally important, the questions inherent in this case which might have inclined this Court to grant certiorari are far deeper than the vacillating policy views of an administrative agency based upon personnel changes. Even if the two new Board members did chart a policy reversing the old, then soon after these mortals pass on, other Board members could whisk the policy right back again to its former posture. Petitioner is arguing

here that the Board may not dabble in policy decisions at all in *this case* as a matter of law, based upon the statutory language and the intent of Congress. These legal issues should be decided once and for all by this Court.

II. THE BOARD MAY NOT DECLINE JURISDICTION OVER UNION EMPLOYERS IN ALL CASES

The Board's principal counterattack against petitioner's arguments is based upon its position that all the statute commands is that union employers be treated the same as other employers—not differently, as "petitioner contends" (NLRB Brief, pp. 26-27). The Board asserts, relying upon the Court of Appeals holding below, that, "It [Sec. 2 (2)] simply puts labor organizations, viewed in relation to their own employees, in the broad category of employers; as the court below held, 'it did no more than that' (R. 264)." Further rounding out the Board argument is the attempt (NLRB Brief, p. 22) to place petitioner in the position of arguing that the Board is compelled, as a matter of law, to assert its jurisdiction over all union employers.

Petitioner wishes to make it explicitly clear that (1) petitioner is not arguing that the Board is compelled, as a matter of law, to assert its jurisdiction over union employers in all cases, and (2) petitioner is not contending that labor union employers be treated differently from other employers.

What petitioner is arguing is this: (1) the Board is compelled, as a matter of law, to not *decline* jurisdiction over union employers in all cases, and (2) to treat labor union employers the same as all other employers does not give the Board discretion to read

labor union employers out of the Act any more than it has discretion to read all employers out of the Act.

Petitioner has previously argued that the Board may not, as a matter of law, decline jurisdiction over union employers in all cases because Sec. 2 (2) specifically includes them, and because the legislative history demonstrates that Congress wanted unions held liable for unfair labor practices in dealing with their own employees. Petitioner believes the discretionary powers so jealously claimed by the Board flowing from the language of Sec. 10 (a) that the Board is "empowered," not directed, to prevent any person from engaging in any unfair labor practice, means that the Board might decline jurisdiction over labor union employer unfair labor practices in (1) particular cases involving particular circumstances where an assertion of jurisdiction might not effectuate the policies of the Act, and (2) situations where there was a meager effect on commerce (although petitioner is not willing to concede that such claimed Board discretion is as broad as the agency believes).

The Board, although not stating it flatly, apparently recognizes that if petitioner's position that the Board has read labor unions as employers out of the Act is correct, then indeed the NLRB action is contrary to law and must be reversed.[1] The Board attempts to

[1] The Board's recognition of the effect of this argument is shown (NLRB Brief, pp. 28-31) when it joins issue on the argument of petitioner that unions do not have employees engaged in commercial business. At p. 31, the Board brief states: "Accordingly, a Board decision not to assert jurisdiction over a labor organization acting as an employer in relation to persons hired to assist it in performing its functions as a union does not mean that the Board is declining to assert jurisdiction over labor-union employers as a class."

escape from this untenable position by continuing to maintain that it will take jurisdiction over unions as employers when they engage in commercial business, as contrasted to unions as employers in their trade union capacity, and therefore, the Board is not declining to assert jurisdiction over labor union employers as a class.

Petitioner, as it did in its main brief, (pp. 21-22) asserts again that labor unions do not have employees working for them in commercial enterprises. The Board brief, while stating that unions do engage in business (Br. 28), nevertheless retreated somewhat to the position: "Although it is rare that unions directly operate commercial businesses, it is undisputed that they exercise control—generally through stock ownership—over many kinds of incorporated businesses . . ." (Br. 29). The Board then implies that in such instances, it could look through the corporate veil to assess responsibility, or it could hold the union stockholders liable as agents of the employer, and thus reach the union as an employer.

Aside from the simple fact that employees of corporate business enterprises are NOT employees of the stockholders (whether these stockholders be labor unions, or members of labor unions, or Henry Ford, or the DuPont family, or anyone else), the Board argument has no meaning. It would not be necessary for the Board to hold labor union stockholders liable as agents of the corporate employer to remedy unfair labor practices. The corporate unfair labor practice, no matter who its stockholders were, could be wholly remedied by the simple expedient of entering an order directed against the corporation.

The Board cites instances in its brief (Br. 30) where it has reached corporate stockholders as agents of the employer when their conduct interfered with the rights guaranteed employees under the Act. Although there are such situations as cited by the Board, in the overwhelming majority of cases the Board does not direct its orders beyond the corporate entity; and while in some instances, directing orders beyond the corporate entity to an interfering stockholder might provide a more comprehensive remedy, the fact remains, nevertheless, that the unfair labor practice can always be remedied by an order directed at the corporate employer. This being so, it would never be necessary for the Board to hold union stockholders liable as agents of employers to remedy unfair labor practices. Consequently, the Board argument that it would hold unions as employers liable for unfair labor practices when they engage in commercial activities collapses as a meaningless array of words.

The amicus brief of the Teamsters unions jumped into the dispute over unions in commercial activities (pp. 97-99) and purported to list a number of examples of unions engaging in business. But outside of the union office building example, which is not a commercial business in the true sense of the word, since the unions involved are primarily using these buildings for housing purposes, neither the Teamsters nor the Board has come up with a genuine example of a union engaging directly in a commercial enterprise, maintaining a staff of employees directly on the union payroll.[2] But even assuming that a rare and isolated

[2] The Mine Workers and Seafarers examples at p. 98 of the Teamster brief show clearly the corporate nature of the business involved. Four examples of unions owning office buildings were

example could be found, which is doubtful, such direct engagement in commercial business would be *de minimus* with emphasis, and still would not defeat the principle maintained here.[3]

Therefore, in summary, to decline to assert jurisdiction over labor union employers in trade union functions is to decline jurisdiction over union employers as a class. The practical effect of this is to render the meaning of Sec. 2 (2) exactly the same as Sen. Wagner originally intended when he introduced his first labor bill. Congress rejected that approach, and amended the bill to include union employers. The NLRB has arbitrarily destroyed an enactment of Congress under its claimed discretion.

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cited at p. 99, but counsel for petitioner is informed that in each and every instance, the union owner does no more than maintain its international headquarters there and rent excess space to other tenants, which is hardly engagement in a commercial enterprise. A further example was cited of the International Typographical Union publishing a daily newspaper, but in the absence of detailed factual proof, counsel does not believe this operation is maintained by the union directly, with the employees of the newspaper working directly on the union payroll. The same belief exists as to the example of the International Printing Pressmen owning and operating a hotel in Colorado Springs, Colorado.

[3] Even if it could be shown that four or six or a dozen unions in 10,000 operated commercial businesses directly, which petitioner does not believe can be shown, such ought to properly come within the *de minimus* principle, thus rendering the Board's ultimate position meaningless. Petitioner does not profess to know how many labor unions there are in the United States, but this record reveals that the International Brotherhood of Teamsters alone has 872 chartered local unions. When such giants as the United Automobile Workers, the United Steel Workers, the Brotherhood of Carpenters, and others are considered, each having hundreds of chartered local unions, the total number of labor unions should easily exceed 10,000 and more.

III. THE POLICY ARGUMENTS OF THE TEAMSTERS ARE FICTIONAL AND ARTIFICIAL.

The Board brief (pp. 38-39) hints that several policy issues considered by the NLRB during oral argument, although not reflected in the Board decision, suggest that no single view may be deemed the only reasonable one on the question whether it would effectuate the policies of the Act to assert jurisdiction. The Teamster amicus brief (Teamster brief, pp. 67-79) goes so far as to argue that some of the alleged problems supposedly created by union employers being compelled to obey the labor law are so great as to demonstrate that Congress intended the Act to apply only to the commercial activities of union employers. These policy issues, or so-called adverse effects, are largely fictional and artificial.

The principal contention raised by the Teamsters is that unions ought to be allowed to have loyal employees. "To require a union to retain in its employ as an organizer, negotiator, collector of dues, or receptionist one who is anti-union or pro-rival union can inflict untold harm on the union" (Teamster amicus brief, p. 72). In other words, the union employer ought to be allowed to discriminate against any employee who is not an "enthusiast" for its point of view. In answering these contentions, certain practical realities of union organizational life ought to be observed. The union negotiator is almost always a business agent, or an executive officer in the union, and most likely would have attained his position by coming up through the ranks of his own union—that is, the employer. As an executive officer of the union employer, he would be a part of management, i.e., the union employer, and of course, would not be a member

of the union representing the rank and file of the employing union's employees. The rank and file employees of a labor union are almost always clericals, as they are in this case, and they would be subject to the same standards of loyalty as employees of any employer. This Court has recognized that "There is no more elemental cause for discharge of an employee than disloyalty to his employer," *NLRB* v. *Electrical Workers,* 346 U.S. 464, 472, and those standards would give any union employer adequate protection against being compelled to retain a disloyal employee.

The Teamster amicus brief attempts to draw a parallel between union employees and the so-called confidential employee that is usually excluded from bargaining units by the National Labor Relations Board[4] (Teamster brief, p. 74). But the clericals in this case who assisted the union officers in formulating and executing labor union policies in the field of labor relations were assisting those union officers in their activities of bargaining for employees of outside employers. None of these clericals would be assisting Teamster executives in their formulation of labor policies toward the union employees. If the Teamster business agent who had the responsibility of bargaining with a clerical union for his office employees had a confidential secretary in his employ, then that particular secretary might be excluded from the bargaining unit as a confidential employee, just as the confidential secretary of an industrial plant manager would

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[4] *B. F. Goodrich Co.*, 1956, 115 NLRB 722, was cited for the well-recognized principle that confidential employees who assist management officials in formulating, determining and effectuating management policies in the field of labor relations are excluded from bargaining units.

not belong to the union. But here the parallel ends. Thus the comparison of ordinary union clericals with the confidential employees ordinarily excluded by the NLRB from bargaining units fails to demonstrate that there would be any problem at all involved.

The Teamster amicus brief also makes reference to an issue touched upon at oral argument before the NLRB (Teamster brief, p. 77), whether the competitive interests of an office employees union and a Teamster union in organizing other office workers would not be sufficient reason to decline jurisdiction over union employers as a matter of policy. While this is a variation of the loyalty theme, the same conditions that motivated the Board in declining to compel an employer to bargain in *Bausch & Lomb Optical Co.*, 108 NLRB 1555,[5] are not present here. First of all, it is doubtful whether the interests of competing labor unions are entitled to the same protections that are accorded competing business enterprises. While our legal structure gives certain protections to commercial investments, property, and enterprise, the basic governing labor statute is not framed in terms of protecting union interests, but in terms of protecting interests of employees. In other words, the rights of employees to organize and bargain collectively are infinitely superior to the rights of any union as an institution to be free of competition.

Secondly and on an even more practical level, there is no reason why the Teamsters, a predatory union attempting to organize employees in all fields of en-

[5] The Board took into account competitive interests in the business world when it refused to order Bausch & Lomb to bargain with a union whose members owned a controlling stock interest in a corporation engaging in a rival business.

deavor, should have their so-called interests afforded any special protection. Although not regulated in law, labor unions ought to have the maturity to define their own lines of jurisdiction and respect those areas. Petitioner is engaged in organizing office workers, not truck drivers, and any alleged competition with the Teamsters is purely a one-way street. The specter of competition between unions as a reason why employees should not be allowed to have protection of the law is a frivolous argument.

IV. THE TEAMSTER OPERATIONS HAVE A PROFOUND EFFECT UPON COMMERCE

One of the principal points of the Teamster amicus brief is that it was not established in this case that Teamster activities affected commerce, and therefore, there was no proper basis for the assertion of NLRB jurisdiction. Indeed, the Teamster brief attempts to show that the Board's decision was based almost entirely on "no effect on commerce," and chooses to relegate to a minor role the Board's finding that it would not effectuate the policies of the Act to assert jurisdiction.

As indicated in its main brief (p. 6), petitioner believes the only sound interpretation of the Board holding is that the decision was founded upon the conclusion that it would not effectuate the policies of the Act. It is interesting to note that the Board brief apparently agrees with petitioner's view, since it considers the policy question as controlling throughout and pays little or no attention to the Teamster position that the Board decided that no effect on commerce had been shown.

The Trial Examiner found that the Teamster organizations were integral parts of a multi-state enter-

prise (R. 94a-97a), and since the annual outflow of dues and initiation fees exceeded six million dollars, he found sufficient effect on commerce to warrant Board jurisdiction. The Board decision does not seriously controvert this finding in any way. The reference in the Board opinion to an effect on commerce not being established (R. 234a) is an isolated statement in the context of a decision wholly based on policy grounds. What the Board meant by saying that no effect on commerce had been established was that for policy reasons, it had considered that non-commercial activities of nonprofit organization did not affect commerce sufficiently to warrant exercise of Board jurisdiction. Certainly the Board could not have meant that the six million dollars of Teamster funds crossing state lines did not have an effect upon commerce within the strict statutory sense.

This interpretation of what the Board meant by its isolated statement that no effect on commerce had been established is bolstered by the Board's past treatment of these so-called nonprofit, non-commercial organizations. As the Board brief pointed out (Br. 35, f.n. 33), the NLRB, on several occasions prior to 1947, had asserted its jurisdiction over nonprofit organizations when their interstate transactions were substantial. In *NLRB* v. *Central Dispensary & Emergency Hospital*, 145 F. 2d 852 (C.A.D.C., 1944), it was held that the sale of services for a fee was trade and commerce. But more important, in the Board's first basic decision on non-assertion of jurisdiction over so-called nonprofit, non-commercial organizations, *Trustees of Columbia University*, 97 NLRB 424, it found that the organization's activities "affect commerce sufficiently to satisfy the requirements of the statute

and the standards established by the Board for the normal exercise of its jurisdiction . . . ."

Union dues, or per capita taxes, are ostensibly rendered to the parent international organization for services to be performed for the benefit of the membership. In this manner, they have a profound effect upon the stream of commerce.

One other point in the Teamster brief needs comment. The Teamster amicus brief assumes (pp. 31-37) that the General Counsel was compelled to show that the Teamster unions represented employees of employers engaged in commerce in order to establish NLRB jurisdiction. This argument overlooks that the General Counsel proceeded here against the Teamsters as employers, and jurisdiction could be established on that basis alone. The basis for jurisdiction over unfair labor practices of labor organizations under Sec. 8 (b) of the Labor Act has no bearing in this case, since the Teamsters unions were proceeded against under Sec. 8 (a), the employer unfair labor practice portion of the Act.

CONCLUSION

For all the reasons heretofore presented, it is respectfully submitted that the decision of the Court of Appeals should be reversed and the case should be remanded to the National Labor Relations Board with directions for it to assume jurisdiction.

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